(10)

No. 05-983

IN THE
SUPREME COURT OF THE UNITED STATES

Jacob Winkelman, a minor by and through his parents and legal guardians, Jeff and Sandee Winkelman, *et al.*,
Petitioners

v.

Parma City School District,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief of *Amici Curiae* Nat'l School Boards Assoc., American Assoc. of School Administrators, Ohio School Boards Assoc., Buckeye Assoc. of School Administrators, Ohio Assoc. of School Business Officials and Greater Cleveland School Superintendents' Assoc. in Support of Respondents

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QUESTION PRESENTED

To what extent, if any, may a non-lawyer parent of a minor child with a disability proceed *pro se* in a federal court action brought pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*

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INTERESTS OF *AMICI CURIAE*[1]

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the nation's over 95,000 school board members. The NSBA Council of School Attorneys is the national professional association for attorneys who represent school districts. The Ohio School Boards Association ("OSBA"), founded in 1955, is a private, not-for-profit statewide organization of public school boards. OSBA currently has 99.9% membership from Ohio public schools. OSBA's purpose is to encourage and advance public education through local citizen responsibility.

NSBA and OSBA recognize that all children, including those with disabilities, have a right to be provided with a free appropriate public education ("FAPE"). Both organizations have consistently supported the rights of disabled children. At the same time, NSBA and OSBA are fully cognizant of the financial and human resources that their members devote each and every year to the education of disabled children. These resources are above and beyond the partial funding provided by the federal government for the education of students with disabilities pursuant to the federal Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (2006) ("IDEA").[2]

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[1] Consistent with Rule 37.6 of this Court, *Amici* submit that no counsel for a party authored this brief in whole or in part. No person or entity, other than the *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief. This brief is filed with the consent of both parties.

[2] Congress reauthorized and amended the IDEA in 2004 at Pub. L. No. 108-446, 118 Stat. 2647. Citations are to the statute as amended in 2004 unless otherwise indicated.

The American Association of School Administrators ("AASA") is a professional organization of over 14,000 educational leaders across the United States and in other countries. AASA supports school district leaders who are dedicated to quality public education in their communities.

The Buckeye Association of School Administrators (BASA) is a professional organization of school administrators in Ohio and has 826 members. BASA's mission is to support and inspire its members, develop exemplary school system leaders and advocate for public education.

The Greater Cleveland School Superintendents' Association ("GCSSA") is a regional superintendents association whose membership comprises approximately 90 superintendents from Northeastern Ohio.

School administrators play an important role in the day-to-day enforcement and implementation of state and federal laws, including the IDEA. As such, members of AASA, BASA and GCSSA are integrally involved in ensuring that children with disabilities receive a FAPE. School administrators understand the collaborative nature of the education process for children with disabilities and understand that there have to be avenues available when there are disagreements about a child's education. AASA, BASA and GCSSA believe that the due process complaint procedure should be reserved for disagreements relating to a child's education. Further, these organizations are concerned that parents should not be put in the position of representing their children in federal court. Rather, parents should be able to remain focused on working with their school districts about the current educational needs of their children. Further, children are entitled to competent counsel to protect their interests and to allow any court action to proceed in an efficient and effective manner.

The Ohio Association of School Business Officials ("OASBO") is a not-for-profit educational management

organization dedicated to learning, utilizing, and sharing the best methods and technology of school business administration. OASBO has over 1000 members, made up of individuals employed in the fiscal management of schools. OASBO members manage the financial responsibility of school districts to educate all children, including children with disabilities. OASBO members understand and are concerned about the heavy financial burden of special education court litigation, particularly when non-lawyers are representing parties to the litigation.

SUMMARY OF ARGUMENT

The purpose of the IDEA is to provide disabled children with a free appropriate public education. *See* 20 U.S.C. § 1400(d)(1)(A); *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176, 179 (1982) ("The Act represents an ambitious federal effort to promote the education of handicapped children."). Children are the focus of the Act and the focus of due process complaints and any appeals of those complaints to federal court.

The plain reading of the IDEA provides that due process complaints are to be brought about problems of the child—not the parents. 20 U.S.C. §§ 1415(b)(6)(A), (b)(7)(A)(ii)(III). The impartial hearing officer's decision at the administrative level is limited to a determination of whether the child received a FAPE. 20 U.S.C. § 1415(f)(3)(E)(i). Any resulting appeal to the State educational agency ("SEA") and then to court must be limited to the issues raised in the due process complaint, that is, the problems of the child. 20 U.S.C. §§ 1415(g)(1), (i)(2)(A). Accordingly, parents have no independent private cause of action and cannot represent themselves *pro se* in any federal court action.

While parents cannot bring their own claims in federal court, they do have other avenues to pursue their

concerns under the IDEA. They can request a records hearing, bring a state complaint or request mediation. Such avenues provide possible remedies for parents and have been used frequently by parents with positive results for children, parents and school districts.

Children do have private causes of action under the IDEA to appeal a due process decision to federal court. Minor children need to have a next friend under Federal Rule of Civil Procedure 17(c) to bring such an action, and the child's parents can serve as that next friend. The parent, however, cannot represent the child *pro se*. When enacting the IDEA, Congress did not explicitly overrule the common law principle that a next friend cannot represent a child *pro se*. Such a prohibition is appropriate in IDEA cases given the complex nature of special education litigation and the fact that parent and child interests may not always align. Further, even while a federal court action is pending and thereafter, the Act expects parents and school districts to continue to work together on behalf of the child. Children need parents who are able to focus on their current and future education and competent representation by attorneys in federal court to address concerns about their past education. In addition, children, courts and school districts all deserve an effective and efficient legal process. Given the limited number of due process decisions appealed to federal court, legal representation is available to children through private attorneys and Protection and Advocacy organizations.

ARGUMENT

I. Parents do not have a private cause of action to appeal a due process decision to federal court.

A. Plain reading of the statute does not support a cause action for parents.

Parents have rights under the IDEA. *See Schaffer v. Weast*, 126 S.Ct. 528, 532 (2005) (noting examples of parental rights).[3] For example, parents have the right to be a member of their child's individualized education program (IEP) team, 20 U.S.C. § 1414(d)(1)(B); to be included in any group that makes decisions on the educational placement of their child, 20 U.S.C. § 1414(e); and to examine any records relating to their child, 20 U.S.C. § 1415(b)(1). However, the IDEA does not allow parents to pursue these rights in a due process complaint or a resulting civil action. Due process complaints are limited to disputes involving *the child.*

The IDEA allows a due process complaint to be brought, "with respect to any matter relating to the identification, evaluation, or educational placement *of the child*, or the provision of a free appropriate public education *to such child*." 20 U.S.C. § 1415(b)(6)(A) (emphasis added). This section makes no reference to claims being brought about the parents' rights under the IDEA. The IDEA goes on to require that a complaint include the following information: 1) the name of the child, the address of the residence of the child and the name of the school the child is attending; 2) in the case of a homeless child, available contact information for the child and the name of the school the child is attending; 3) "a description of the nature of *the problem of the child* relating to such proposed initiation or change, including facts relating to such problem;" and 4) a

[3] Respondents have correctly argued that these rights are procedural as opposed to substantive rights. *See* Resp. Br. at 25-32.

proposed resolution of the problem to the extent known and available at the time. 20 U.S.C. § 1415(b)(7)(A) (emphasis added). Again, this statutory language provides that a due process complaint is about a "problem of the child." It makes absolutely no reference to the problems or rights of the parents.[4] The IDEA further provides that a due process hearing will be limited to the issues raised in the complaint unless the other party agrees otherwise, confirming that a due process proceeding will be limited to matters relating to the problems of the child. 20 U.S.C. § 1415(f)(3)(B).

While the IDEA specifically limits due process complaints to a "problem of the child," 20 U.S.C. § 1415(b)(7)(A)(ii)(III), the Act does make reference to parents in the due process procedures. *See, e.g.*, 20 U.S.C. § 1415(c)(2)(B)(i)(1). The United States' brief explains why Congress used the term parent in the due process procedures when the rights really belong to the child. The parents' right to file an IDEA action on the child's behalf results from Rule 17(c) of the Federal Rules of Civil Procedure. Rule 17(c) allows a parent or other guardian to "sue or defend on behalf" of a minor child. The United States reasons that if the child is the "party aggrieved" under the IDEA, then the parent would bring the cause of action on behalf of the child under Rule 17(c). Brief for the United States as Amicus Curiae Supporting Petitioner at 10-11. As the child's "next

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[4] Due process complaints may also be brought in disciplinary situations, but only in the limited circumstances in which the child's educational placement is affected. 20 U.S.C. § 1415(k)(3)(A) provides that a due process complaint may be brought about a placement decision or the manifestation determination that has been completed. In these situations, a hearing officer's determination is limited to addressing the child's placement. The hearing officer may either order that the child return to the placement from which the child was removed or may order a change in placement to an appropriate interim alternative educational setting. 20 U.S.C. § 1415(k)(3)(B)(ii).

friend," "[i]t is the infant, and not the next friend, who is the real and proper party." *Morgan v. Potter*, 157 U.S. 195, 198 (1895).

The United States' explanation of Congress' use of parent is logical when one reviews the demographic data about children with disabilities. The IDEA provides that children between the ages of 3 and 21, inclusive, are entitled to a FAPE, 20 U.S.C. § 1412(a)(1)(A); however, very few children served by IDEA are 18 or older. Data collected by the U.S. Department of Education, Office of Special Education Programs from the 50 states, the District of Columbia and outlying areas show that in the fall of 2005, only 4.7% of the students served under the IDEA were 18 or older. Table 1-1. *Children and Students Served Under IDEA, Part B, by Age, Group and State: Fall 2005, at* https://www.ideadata.org/tables29th/ar_1-1.htm. That means that 95.3% of all students served under the IDEA would need to have a next friend bring the child's cause of action under Rule 17(c). With this overwhelming number of minors receiving special education services, it is not surprising that Congress would refer to their parents when describing the due process procedures.

After an impartial due process hearing is held pursuant to 20 U.S.C. § 1415(f)(1)(A), the impartial hearing officer must make a decision "on substantive grounds based on a determination of whether *the child* received a free appropriate public education." 20 U.S.C. § 1415(f)(3)(E)(i) (emphasis added). Petitioners and their *amici* spend considerable effort addressing procedural versus substantive claims in due process proceedings and how those rights may belong to parents. However, such issues, in the context of due process complaints, are only relevant as they relate to *the child*. In the 2004 amendments to the IDEA, Congress delineated the relative importance of procedural issues in the context of the substantive rights of the child. As indicated above, the hearing officer's decision is made on "*substantive*

grounds" based on whether "*the child*" received a FAPE. 20 U.S.C. § 1415(f)(3)(E)(i) (emphasis added). If procedural violations are alleged, then the hearing officer "may find that *a child* did not receive a [FAPE]" only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process, or caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii) (emphasis added). Thus the parents' opportunity to participate in the decisionmaking process is not a separate cause of action in a due process complaint; rather, it is evidence that can be submitted in support of an argument that the child did not receive a FAPE.

The *amici* brief by members of Congress unintentionally supports this focus on the rights of the child—not parents. The brief asserts that Congress elevated substance over form in the IDEA but in so doing cites to legislative history found at H.R. Rep. No. 108-77, at 85 (2003): "Litigation under the Act has taken the less productive track of searching for technical violations of the Act by school districts rather than being used to protect *the substantive rights of children* with disabilities" (emphasis added). Brief for Senator Edward Kennedy et al. as Amici Curiae Supporting Petitioners at 26. *See also,* S. Rep. No. 208-185, at 41-42 (2003).

After the impartial hearing officer's decision, the aggrieved party may appeal the findings and the decision to the SEA. 20 U.S.C. § 1415(g)(1). The focus of Petitioners and their *amici* on the "aggrieved party" language in the Act is a red herring. The focus should be that the appeal to the SEA does not allow the issues in the due process proceedings to expand or change. The appeal is limited to the impartial hearing officer's decision as it relates to the complaint. *Id.* Similarly, a civil action is limited to the underlying complaint brought to initiate the due process proceeding. 20 U.S.C. § 1415(i)(2)(A). Accordingly, the

federal court action is limited to the issues raised in the complaint, which as indicated above, are limited to the problems of the child. 20 U.S.C. §§ 1415(b)(6)(A), (b)(7)(A)(ii)(III). Just as the United States suggests, the child is the "aggrieved party," with the parent as the next friend.

A plain reading of the statute indicates that the IDEA provides that due process complaints are about the child. Due process complaints are not about claims that parental rights—whether procedural or substantive—have been violated. Accordingly, this statutory language simply cannot support a conclusion that parents have an independent cause of action to bring a due process complaint on their own behalf to the administrative level or ultimately to federal court. Parents may only bring civil actions in federal court on behalf of their child under Federal Rule of Civil Procedure 17(c) since only the problems of the child may be raised in a complaint appealed through a civil action.

B. Parents have alternative avenues to pursue any rights they may have under the IDEA.

While parents cannot bring a due process complaint about any rights they may have under the Act, they do have other avenues of redress available to them under the IDEA and its implementing regulations. Indeed, as discussed below, some of these other avenues have been used more effectively than due process proceedings.

1. With respect to parental rights about their child's educational records, Congress directed the Secretary to take appropriate action to ensure the confidentiality of any personally identifiable data, information and records. 20 U.S.C. § 1417(c). Regulations promulgated on August 14, 2006 include the parents' right to request a hearing before the school district to challenge information in education

records in certain circumstances. 34 C.F.R. § 300.619. These hearing procedures are completely separate and distinct from due process hearings. *See* 34 C.F.R. § 300.621.

2. The regulations also provide another forum for parents to bring disagreements: through the SEA complaint procedure. 34 C.F.R. § 300.151(a)(1). SEAs are required to have a procedure in place to address complaints brought by *any* organization or individual (including parents) alleging a violation of *any* requirement under Part B of the Act. 34 C.F.R. § 300.151, .153. Such complaints are not limited to problems of the child and the issues raised in a due process complaint. *Id.*; *see also* 34 C.F.R. § 300.152(c).[5]

The SEA is charged with resolving the complaint. 34 C.F.R. § 300.151(a). If the SEA finds a failure to provide appropriate services, then the SEA must address the failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and appropriate future services for all children with disabilities. 34 C.F.R. § 300.151(b). These remedies are as extensive, if not more extensive, as those available in due process proceedings.[6]

The General Accounting Office has noted that state complaints are generally much less expensive to school

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[5] Parents may also choose to file a due process request on behalf of their child on the same subject about which they are bringing a complaint; however, the SEA will set aside the part of the state complaint addressed in the due process hearing until the conclusion of that hearing. 34 C.F.R. § 300.152(c).

[6] Judgments in IDEA cases are directed at children and their educational rights. *See, e.g., Sellers v. Sch. Bd. of the City of Mannasas*, 141 F.3d 524, 527 (4th Cir. 1998) ("Compensatory or punitive damages would transform the IDEA into a remedy for pain and suffering, emotional distress, and other consequential damages caused by the lack of a free appropriate public education. Such a result would be inconsistent with the structure of the statute, which so strongly favors the provision of and, where appropriate, the restoration of educational rights.").

districts, parents, and SEAs than due process hearings. GAO, Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U.S. Senate, *Special Education: Numbers of Formal Disputes are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* (GAO-03-897) at 7 (2003) ("GAO Report"). One study has estimated that for the 2000-2001 school year, more decisions were reached in state complaints than in due process hearings. Dr. Howard Schrag and Dr. Judy Schrag, *Dispute Resolution (DR) Procedures, Data Collection, and Caseloads* (2003), *at* www.directionservice.org/pdf/Dispute%20Resolution%20Study.pdf. Specifically, the study estimates that 7,874 state complaints were filed in 2000-2001, with 5,126 decisions being rendered. The total number of due process hearings requested was estimated at 12,914, with only 3,593 decisions.

3. Mediation is another forum available to parents. 20 U.S.C. § 1415(e) requires that mediation be available to resolve disputes about "*any matter,*" including due process complaints (emphasis added). This is markedly broader than the reasons for which a due process complaint may be brought, which, as indicated above, must be about matters involving the child.

Mediation is a successful alternative resolution process. In the 1999-2000 school year, more formal disputes were resolved through mediation than through due process hearings. GAO Report, *supra*, at 15. To further illustrate the success of mediations, in the Winkelmans' home state of Ohio, 98 mediations were held in the 2004-2005 school year: 59 were related to a due process complaint, while 39 were not. 84.3% of the mediations resulted in a resolution with a mediated agreement. Ohio's Part B State Performance Plan (SPP) for 2005-2010, at 129 (November 30, 2005), http://www.ode.state.oh.us/GD/Templates/Pages/

ODE/ODEDetail.aspx?page=3&TopicRelationID=968&Content=16899.[7]

Mediations also have other beneficial byproducts. The GAO found in conversations with officials from four states, including Ohio, that mediation offered benefits to all parties involved. Specifically, state officials said that mediations help foster communications between schools and parents and strengthen relationships. Also, mediations resolved disputes more quickly than state complaints or due process hearings. GAO Report, *supra*, at 18. In *Schaffer v. Weast*, 126 S.Ct. at 532, the Court recognized that the "cooperative process . . . between parents and schools" is at the core of the IDEA. Mediation provides this opportunity effectively.

4. It was these kinds of alternative avenues that the Court considered in its decision that there is no private cause of action, for either children or parents, under the Family Educational Rights and Privacy Act. 20 U.S.C. § 1232g *et seq.* ("FERPA"). *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). Like the IDEA, FERPA is Spending Clause legislation. *Gonzaga Univ.*, 536 U.S. at 278.[8] "For a statute to create such private rights, its text must be 'phrased in terms of the persons benefited.'" *Id.* at 284 (quoting, *Cannon v. University of Chicago*, 441 U.S. 677, 692, n.13 (1979)). The Court noted, for example, that Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 created individual rights because those statutes had "an *unmistakable focus* on the benefited class." *Id.* As indicated above, under the IDEA disabled children are the benefited class in due process complaints. Due

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[7] It should be noted that due process hearings are fairly uncommon in Ohio. In 2004-05, there were 184 requests for due process, but only 15 impartial due process hearing decisions were issued that year. *Id.* at 122.

[8] Respondents discuss further how a Spending Clause analysis of the IDEA results in a conclusion that non-lawyer parents may not proceed *pro se* in federal actions under the IDEA. Resp. Br. at 40-49.

process complaints are to be brought about disabled children and their problems. 20 U.S.C. §§ 1415(b)(6)(A), (b)(7)(A)(ii)(III).

In *Gonzaga,* the Court recognized that certain rights had been put in place in FERPA for parents and students. These protections, however, did not result in the rights being enforceable in a court of law. *Gonzaga Univ.*, 536 U.S. at 288. The Court observed that Congress had chosen other avenues to enforce the rights, specifically the establishment of a review board. The Secretary of Education created the Family Policy Compliance Office that investigates complaints brought by students and parents who suspect a violation of FERPA. *Id.* The Court concluded that this federal review mechanism under FERPA "further counsel[s] against our finding a congressional intent to create individually enforceable private rights." *Id.* at 290.[9]

Like FERPA, the IDEA provides federal review mechanisms for parents who allege that their rights have been violated. Contrary to the views of Petitioners and their *amici*, a holding that parents do not have a private cause of action in federal court under the IDEA to enforce their own rights would not leave parents without redress. They would still maintain the rights to demand a records hearing, bring a state complaint or request mediation. 20 U.S.C. §§ 1221e-3; 1415(e), 1415(f)(2)(F), 1417(c).

C. An alternative reading would lead to absurd results that do not support the purpose of the IDEA.

1. With the exception of the United States, Brief for the United States at 10-11, n. 3, Petitioners and their *amici*

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[9] The Court further stated, "We need not determine whether FERPA's procedures are 'sufficiently comprehensive' to offer an independent basis for precluding private enforcement, due to our finding that FERPA creates no private right to enforce." *Id.* (citations omitted).

have wrongly concluded that the use of "parent" in the due process section of the Act means that parents have their own private cause of action to bring a due process complaint and any resulting civil action in federal court. Such a reading, however, would lead to absurd results.

As discussed in Part I.A., *supra*, the logical reading of parent in the due process section of the Act is that it means the parent is bringing the cause of action on behalf of the child under Rule 17(c). If "parent" actually means that it is the parent who has the right to bring the cause of action on his or her own behalf, then the child gets lost in the process. *See Doe v. Board of Educ. of Baltimore Cty.*, 165 F.3d 260, 263 (4th Cir. 1998) ("The references to parents are best understood as accommodations to the fact of the child's incapacity. That incapacity does not collapse the identity of the child into that of his parents."). The logical extension of Petitioners' reading would be that, indeed, the child's rights do collapse into the parents' and only parents may bring due process complaints. This would effectively extinguish any right a child would have (presumably with a next friend under Rule 17(c)) to bring an action under the IDEA for that child's rights. The child would have to rely solely on a parent to choose what claims to bring or not to bring. Such a reading would be contrary to the purpose of the IDEA. The IDEA was not enacted to serve the interests or rights of parents. The first purpose identified by Congress in the IDEA is: "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living." 20 U.S.C. § 1400(d)(1)(A).

The Petitioners' reading of the statute skews the focus of the IDEA from children to parents. While parents are an important part of the educational process, their rights under the Act are not an end unto themselves. Instead, those

rights are simply one component of an Act, the purpose of which is to provide children with a FAPE. *Rowley*, 458 U.S. at 179 ("The Act represents an ambitious federal effort to promote the education of handicapped children.") Commentators have summarized the parents' role in meeting this legislative purpose as being "utilitarian," specifically, "to enhance the effectiveness of their children's educational programs, rather than as a substantive right of parenting or a special form of parents' rights to raise their children as they see fit." Lynn M. Daggett, Perry A. Zirkel, LeeAnn L. Gurysh, *For Whom The School Bell Tolls But Not The Statute of Limitations: Minors and the Individuals With Disabilities Education Act*, 38 U. Mich. J.L. Reform 717, 728 (2005) (citations omitted). As discussed in Part I.A., *supra*, Congress limited due process complaints to problems of a child. 20 U.S.C. §§ 1415(b)(6)(A), (b)(7)(A)(ii)(III). To read "parent" to mean anything but acting as the next friend of the child would misread the statute and the purpose behind it.

2. To read "parent" as meaning more than the parent bringing the claim on behalf of the child would lead to expanded litigation. Petitioners and their *amici* all but ignore the definition of "parent" in the IDEA. The term parent includes a natural, adoptive or foster parent, a guardian, a surrogate parent or an individual who is legally responsible for the child's welfare. 20 U.S.C. § 1401(23). Parent also means "an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives." 20 U.S.C. § 1401(23)(C). The Act does not limit the definition of parent to one who has custody. The Act also does not give a hierarchy of parental rights, that is, it does not say that a biological parent's opinion trumps that of a stepparent or grandparent. Under the Petitioners' reading, any of these individuals–grandparents, stepparents, or other relatives—could have a right to bring a due process complaint on their

own behalf, regardless of what may be in the best interest of the child or the opinion of a custodial parent.

School districts are often caught in the middle of heated and passionate disagreements between divorcing parents, parents and stepparents, and parents and grandparents over what is in the best interest of the child. With Petitioners' reading of the Act, these disagreements would play out in federal court. For example, a non-custodial parent, with no rights to make educational decisions, could bring his own lawsuit in federal court under the IDEA. The school district would be forced to defend itself in that lawsuit even though the custodial parent had not brought a due process complaint about the child's education.

This was exactly the result in *Navin v. Park Ridge Sch. Dist.*, 270 F.3d 1147 (7th C.r. 2001). The father, the non-custodial parent, brought a due process request on his own behalf and on behalf of his son. The mother, the custodial parent, was not a party to the lawsuit. Under the divorce decree, the child's mother had the right to make educational decisions. The father maintained the right to inspect education records, communicate with school staff and participate in school activities. *Id.* at 1149. The Seventh Circuit recognized that the father's claims could be contrary to the mother's, but held that the father had a right to proceed. The court remanded the case to the district court to determine whether the father's claims were incompatible, not with the divorce decree itself, but with the mother's use of her rights under the decree. *Id.* at 1149-50. On remand the district court would presumably have to determine what interests the mother, a non-party, had in the claim and then how those interests related to the father's interests and whether he could proceed with his claim. All the while, the school district would have to be party to a federal court proceeding with all the attendant costs. *See* discussion at Part II.B.2., *infra*. Such litigation focuses on the squabbles of the adults and leaves out the interest of the child.

Under Petitioners' reading, all of these "parents," including grandparents, stepparents and non-custodial parents, would also have the right to bring actions *pro se* to federal court. As a result, a school district could possibly face two court actions (or more) about the same child, where one "parent" claims that a child needs a certain educational plan and another "parent" claims that the child needs the exact opposite. Having diametrically opposed claims in federal court does not serve a child's interest. Such a possibility only results in more legal costs for school districts. This is not the result intended by the Act. The due process complaint is supposed to be about the child. "Parents" cannot be parties to federal court actions able to conduct their own cases under 28 U.S.C. § 1654. Parents can sue solely on behalf of their child to protect their child's interests under the IDEA. This is the plain meaning and purpose of the Act.

II. Lay parents may not represent their child *pro se* under the IDEA.

A. The common law rule prohibiting parent *pro se* representation applies in IDEA cases.

As indicated above, children have a cause of action to bring a due process complaint to federal court. Minor children must bring such a claim through their next friend under Rule 17(c). However, that next friend cannot represent the child *pro se*. Under common law, a non-lawyer may not represent another person in court. *Herrera-Venegas v. Sanchez-Rivera*, 681 F.2d 41, 42 (1st Cir. 1982); *Guajardo v. Luna*, 432 F.2d 1324 (5th Cir. 1970). *See* Resp. Br. at 9-12.

1. The common law prohibition against *pro se* representation of others is borne out of valid policy considerations, including the state's interest in regulating the practice of law, and the fact that attorneys are subject to professional and ethical standards that lay persons are not. *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 231 (3d Cir. 1998). Particularly in the complex world of IDEA litigation, a lack of regulation of *pro se* parents leads to problems not only for the children being represented (*see* Part II.A.3., *infra*), but also for school districts trying to defend against their claims and, not least for the courts adjudicating these cases.

2. Petitioners focus on the fact that the IDEA does allow parents to proceed *pro se* at the administrative hearing level. This reflects the intent of the law to foster a collaborative process between parents and school districts. As discussed above, the IDEA expects parents and school districts to work cooperatively. The IDEA administrative due process proceedings are designed to encourage this cooperation even though the parties are in disagreement.

For example, within a short period of time after a due process complaint is filed, parents and school districts are to meet in a resolution session to attempt to resolve the complaint. 20 U.S.C. § 1415(f)(1)(B). Lawyers are discouraged from attending this meeting. *Id.* If the matter proceeds to hearing, the hearing is less formal than a court proceeding. "IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence." *Schaffer*, 126 S.Ct. at 536. Once the parties go to federal court, however, the dynamics change and the parties should have legal counsel.

The ability of parents to act *pro se* only at the administrative level makes sense as a matter of policy. First, the hearing officers at the administrative level are educational experts. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 865 (6th Cir. 2004); *Lamoine Sch. v. Ms. Z*, 353 F. Supp. 2d 18, 29 (D. Me. 2005); *Kirkpatrick v. Lenoir County Bd. of Educ.*, 216 F.3d 380, 384 (4th Cir. 2000). Second, the rules of evidence and civil procedure (including discovery) do not apply at the administrative level, so there is less need for legal expertise. Third, the parties can supplement the record at the court level; therefore, if a *pro se* parent makes any mistakes at the administrative level, they may be remedied. 20 U.S.C. § 1415(i)(2)(C). Thus, the administrative level is a more accommodating environment for parents who act *pro se* than court proceedings where the rules of evidence and civil procedure apply and formal discovery occurs. Finally, *pro se* parents have little, if any, knowledge about how IDEA cases operate at the federal court level. Prohibiting their *pro se* representation conserves valuable judicial time and resources.

As Petitioners and their *amici* readily admit, an IDEA federal court appeal is complex litigation. *See* Brief for the United States as Amicus Curiae at 28; Brief of Council of

Parent Advocates and Attorneys et al. as Amici Curiae at 9. IDEA cases are not like the Supplemental Security Income (SSI) disability cases cited by Petitioners. SSI cases are relatively simple legal matters. "[S]uch proceedings do not necessarily present the complexities present in other kinds of actions." *Machadio v. Apfel*, 276 F.3d 103, 109 (2d Cir. 2002).[10] "An appeal from the denial of SSI benefits is a common and fairly simple proceeding that is often prosecuted without the assistance of counsel." *Harris v. Apfel*, 209 F.3d 413, 416 (5th Cir. 2000) (citing *Maldonado v. Apfel*, 55 F. Supp. 2d 296 (S.D.N.Y. 1999)). In contrast, IDEA cases are exactly the types of cases where the need for competent legal representation is great.

IDEA cases are more analogous to tort cases than SSI cases, and courts have consistently held that parents may not represent their children *pro se* in tort cases.[11] Before the 2004 amendments, the IDEA contained no statute of limitations. Consequently, in IDEA cases, courts, looking for the most closely analogous statute of limitations under state law, turned to tort cases. *See Birmingham v. Omaha Sch. Dist.*, 220 F.3d 850, 854 (8th Cir. 2000) (applying a two-year statute of limitations grounded in state tort law); *Scokin v. Texas*, 723 F.2d 432, 436 (5th Cir. 1984) (applying a two-year statute of limitations grounded in state tort law); *Tokarcik v. Forest Hills Sch. Dist.*, 665 F.2d 443, 454 (3d Cir. 1981) (suggesting the two-year statute of limitations

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[10] The *Machadio* court further recognized that even in the social security context, some cases could be of such complexity that a parent should not be allowed to represent his or her child *pro se*. "There will be cases where, for example, the issues are sufficiently significant or complex so that a non-attorney parent will not be able to proceed without compromising the rights of his or her child." 276 F.3d at 108.

[11] *Johns v. County of San Diego*, 114 F.3d 874, 877 (9th Cir. 1997); *Osei-Afriye v. Medical College of Penn.*, 937 F.2d 876, 882-83 (3d Cir. 1991); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986).

applicable to personal injury and medical malpractice actions should govern IDEA appeals). Because tort cases are more analogous to IDEA cases than SSI cases, the same rule prohibiting parental *pro se* representation should apply in both contexts.

Petitioners argue that these tort cases are distinguishable because in the IDEA context the interests of the parents and children will always be aligned. This is a false assumption. In the IDEA context, the interests of the children and parents will not always be consistent. *See* Part II.A.3., *infra*). Therefore, the common law rule prohibiting parent *pro se* representation as upheld in tort cases should also apply in IDEA cases.

3. *Amici* to Respondent acknowledge that most parents act in what they believe to be the best interest of their child. Some parents, however, may be motivated by financial considerations, like tuition reimbursement, or other personal motives, such as in a divorce situation, or may be too emotionally invested in their child's situation to be objective. For example, in a recent state level decision, the hearing officer denied a guardian's request to refer a fifth-grade student with 20/40 corrected vision for placement in a residential facility for blind students. *Conway Sch. Dist.*, 46 IDELR 208 (Ark. SEA Feb. 17, 2006). Such a placement was clearly inappropriate and against the child's best interest. The hearing officer held the school's IEP placement in a regular classroom was proper, noting that the student did not even have a "visual impairment" as defined under Arkansas law. *Id.*

In *A.S. v. Board of Educ. for the Town of West Hartford*, 47 Fed. Appx. 615 (2d Cir. 2002), the parent claimed that the district's plan to transition his son from a residential placement to a public high school did not adequately address his child's needs and proposed a placement at a private, non-special education boarding school. *Id.* at 616. While the parents may have wanted the

school district to pay for boarding school, the court upheld the trial court's determination that the district's placement at its high school would have provided the student with a meaningful educational benefit in the least restrictive environment. *Id.* at 617.

Parents' interests may also not be aligned with those of their children if the parents are divorced. "When there is a divorce and the divorced parents disagree about their child's special education, they lose the ability to be effective advocates for their child." *See* Daggett, 38 U. Mich. J.L. Reform at 739.

Congress recognized that parents have the potential to abuse the IDEA process when it amended the IDEA in 2004 to allow school districts to recover attorney fees. 20 U.S.C. § 1415(i)(3)(B)(i)(II), (III). Congress recognized that some parents may pursue IDEA actions for the wrong reasons, *i.e.*, monetary gain, which demonstrates that the interests of parents and their children are not always the same in the IDEA context. [12]

Sometimes, parents, while well meaning, may have their judgment clouded by emotion or other reasons and reach the wrong conclusions about the educational needs of their children. In the instant case, the parents, presumably motivated by what they thought was in their son's best interest, kept their son out of school programming during the 2004-05 school year while decision after decision found that the school district had offered FAPE. *See* Resp. Br. at 4-6.

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[12] The possibility of a school district even recovering attorneys' fees from parents appears to be slight. First, courts will likely set a high threshold for recovery. Second, if the statistics offered by *amici* for Petitioners are accurate, some parents involved in special education disputes are of limited financial means. *See* Brief of Ohio Coalition for Education of Children with Disabilities et al. as Amici Curiae Supproting Petitioners at 12; Brief of Council of Parent Attorneys and Advocates et al. as Amici Curiae Supporting Petitioners at 9-12.

In *Pachl v. School Bd. of Anoka-Hennepin Indep. Sch. Dist. No. 11*, 453 F.3d 1064 (8th Cir. 2006), the parents sued the school district when it developed an IEP that provided for their daughter to spend two hours per day in a special education classroom, as opposed to the general education classroom. *Id.* at 1066. The parents insisted that their daughter spend her entire school day in the regular education classroom. *Id.* The school district fought to provide more services in a special education setting, presumably at greater cost to the school district, because the educators involved believed the student would receive a greater benefit from the small structure of the special education class rather than the large, lecture-driven general classroom. *Id.* at 1069. The court of appeals upheld the district court's decision in favor of the school district. This case shows the interest of the child is sometimes harmed when parents make bad educational choices for their child.

B. The purpose of the IDEA is served if children have legal representation.

The purpose of the IDEA—to provide a free appropriate education for children with disabilities—is furthered if children's interests are protected by competent legal counsel. Children in IDEA cases deserve skilled, independent counsel to represent their interests, not only because their parents' interests may not be the same as theirs, as explained *supra*, but also because as courts have recognized, a party is at a disadvantage without independent, third-party representation. Further, requiring independent counsel helps ensure that the collaborative intent of the IDEA will be promoted.

1. Requiring parents to play the role of parent and legal advocate is burdensome for parents and not effective for the child. The IDEA contemplates a collaborative relationship between parents, teachers, and special education

administrators at every step in the development of a student's IEP and the determination of his or her educational placement and services. 20 U.S.C. § 1414(d). Parents and educators need to focus their energies on working together to develop educational programming for the child and not on adversarial legal proceedings. When parents act *pro se*, they must act as zealous advocates in a litigation posture and then later revert to cooperative partners with school officials when the legal proceedings end.[13] These roles are hardly complementary, making it difficult at best for parents to be effective at both.

The collaborative process required under the Act is not easy and requires effort by all parties: "[p]articularly in this difficult area of education for a disabled child, it takes a firm resolve, by parents and educators alike, to work collaboratively, in pursuit of a child's education, even when that collaboration is challenging, choices are limited, and patience runs thin." *Wagner v. Board of Educ. of Montgomery Cty.*, 340 F. Supp. 2d 603, 610 (D. Md. 2004). This process may be daunting and emotionally charged for many parents. *Howey v. Tippecanoe Sch. Corp.*, 734 F. Supp. 1485, 1492 (N.D. Ind. 1990) ("It is understandable that when one is confronted with the frustrations of this kind of disability and the attendant emotional context it may well be a human failing that causes one so situated to want to throw all of the rocks that can possibly be gathered at the school officials involved."). Parents may better serve their child's interests by focusing such emotion and energy on their child's current educational needs in the collaborative process with the school district rather than on legal posturing and litigation strategy.

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[13] This case is, unfortunately, the perfect example. While litigation has dragged on, the Winkelmans are still meeting with Parma School District officials to try to draft an IEP for Jacob for his present educational needs. If the Winkelmans are allowed to proceed *pro se*, it will hardly set the stage for collaborative, productive IEP meetings in the future.

In court proceedings, an objective, professionally trained attorney may be better able to represent a student's interests than parents who are emotionally invested in the outcome of the case. In the context of denying attorneys' fees for services performed by an attorney-parent who represented his child in an IDEA case, a court held, "Like attorneys appearing *pro se*, attorney-parents are generally incapable of exercising sufficient independent judgment on behalf of their children to ensure that 'reason, rather than emotion' will dictate the conduct of the litigation." *Doe v. Board of Educ. of Baltimore*, 165 F.3d 260, 263 (citing *Kay v. Ehler*, 499 U.S. 432, 437 (1991)); *see also Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087, 1091 (9th Cir. 2006); *S.N. ex rel. J.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601, 603 (2d Cir. 2006) ("The danger that a parent-attorney would lack sufficient emotional detachment to provide effective representation is undeniably present in disputes arising under the IDEA."); *Woodside v. School Dist. of Phila. Bd. of Educ.*, 248 F.3d 129, 131 (3d Cir. 2001).

2. Allowing parents to proceed *pro se* will increase the already burdensome costs of special education litigation. *See Iannaccone v. Callahan*, 142 F.3d 553, 557 (2d Cir. 1998) (noting *pro se* litigants can "burden the court by filing illogical or incomprehensible pleadings, affidavits and briefs."). An effective legal process is essential to reduce the ever-increasing costs of special education, which are passed on to all students. As this Court has recognized, "there is reason to believe that a great deal is already spent on the administration of the [IDEA]." *Schaffer*, 126 S.Ct. at 535. The United States Department of Education reports that public school systems spent approximately $78 billion educating special education students during the 1999-2000 school year alone. *See* U.S. DEP'T OF EDUC. TWENTY-FOURTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT at I-20 to I-23 (2002). This constitutes

almost 22% of elementary and secondary schools' total spending and is double the amount spent on all other students. *Id.* These costs are borne primarily by state and local governments. While the federal government committed to funding 40% of the per pupil special education costs when it first enacted the predecessor statute to the IDEA in 1975, more than 30 years later, it still funds less than 20 percent of those costs, creating a cumulative funding deficit of more than $59 billion for the last four fiscal years. NSBA, *Priority Issue: Federal Funding for Education* (Jan. 2006), *at* www.nsba.org/site/docs/35100/35033.pdf.

Focusing specifically on dispute resolution, during the 1999-2000 school year, the nation's school districts spent around *$146.5 million* on due process, mediation, and litigation activities for all K-12 special education students in public schools. Center for Special Education Finance, "SEEP" Special Education Expenditure Report, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000?*, at v (2003). Of this $146.5 million, districts spent approximately $90.2 million on mediation and due process, and $56.3 million on litigation cases. *Id.* In addition to educational costs, schools spend an average of $8,160-12,200 for each due process hearing or mediation and nearly seven times that on litigation in federal court.[14]

Also, while it has not been specifically suggested, it would not be an effective legal process to toll the statute of limitations until the child reaches the age of majority. First, such tolling would be directly contrary to the IDEA 2004, which requires that requests for due process hearings must be filed by parents or schools within two years of the date the parent or agency "knew or should have known" of the alleged violations. 20 U.S.C. § 1415(f)(1)(C). Second,

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[14] Other documentation suggests that these estimated costs are closer to $25,000-40,000. *See* David Gruber, *Communication and Conflict Resolution Skills Can Lead to Lasting Relationships for Children, Focus on Results, available at* www.cenmi.org/focus/dispute/article_05-02.asp.

tolling would allow children's problems to persist for years. The school needs to be put on notice of problems in the child's education as soon as possible so that changes can be made to ensure the child receives a FAPE sooner rather than later. Daggett, 38 U. Mich. J.L. Reform at 764. Finally, allowing parents to wait to file claims would "undercut[] the intent and framework of the act and put[] both the child and the school district at risk of untimely proceedings and wasted resource allocation." *Id.* at 765.

3. Petitioners express fear that children with disabilities will not have their "day in court" if their parents cannot represent them *pro se*. *See* Brief of Equal Justice Foundation et al. as Amici Curiae Supporting Petitioner at 12.[15] This fear is unfounded for several reasons. First, the number of IDEA cases actually appealed to court is small due to other forms of dispute resolution such as mediation; therefore, the need for legal representation is not as great as asserted by Petitioners. "Overall, dispute resolution activity was generally low relative to the number of students with disabilities. About 5 due process hearings were held per 10,000 students with disabilities." GAO Report, *supra* at 2. The GAO further noted, "[p]arties that are not satisfied with a due process hearing decision may bring a civil action in federal or state court but such actions are uncommon and were not included in our review. In the 1998-99 school year, an estimated 301 civil actions were initiated nationwide." *Id.* at n. 2.

The Autism Society of America identified 41 private attorneys available to represent students in IDEA claims in just nine states they surveyed. *See* Brief for Autism Society of America, et al. as Amici Curiae Supporting Petitioners at 8. If only 301 suits were initiated nationwide, the 41 attorneys in nine states as asserted by the Autism Society is

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[15] Congress could have addressed this issue when it reauthorized the IDEA in 2004, but it chose not to do so. *See* Resp. Br. at 15-16.

actually a reasonable number of attorneys to take on these claims.

If, however, in this technical field there really is a dearth of competent private legal counsel as Petitioners and their *amici* assert, the answer is not to turn over these highly complex legal disputes to untrained parents. Rather, Congress has legislated a solution to this problem by creating Protection and Advocacy groups, known as "P&As." The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. *See* Brief for National Disability Rights Network As Amicus Curiae Supporting Petitioners, *U.S. v. Georgia*, 546 U.S. 151 (2006) (Nos. 04-1203 and 04-1236). P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all people with disabilities in a variety of settings. In fiscal year 2004, P&As served over 76,000 persons with disabilities through individual case representation and systemic advocacy. *Id.* at 1. The 301 IDEA civil actions filed in 1998-99 school year would equal less than half of one percent of the total volume of cases handled by P&As. Thus, P&As appear to have the ability to meet the representation needs of special education children and, if not, a modest increase in their funding could provide for such representation.

Second, children have access to the court system through Federal Rule of Civil Procedure 17(c). Under Rule 17, minors are precluded from determining their own legal actions. Rule 17(c) provides that a representative or guardian "may sue or defend on behalf of the infant." Circuit courts have already applied this rule to handle IDEA cases where parents have attempted to proceed *pro se*. For instance, in *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281 (2d Cir. 2005), the court deferred its decision regarding the merits of the IDEA claims for the limited purpose of permitting counsel to be retained to represent the minor child under Rule 17(c). In support of that conclusion, the court

quoted its own precedent for the proposition that "[t]he choice to appear *pro se* is not a true choice for minors who under state law, see Fed. R. Civ. P. 17(b), cannot determine their own legal actions." *Id.* at 284 (quoting *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990) (court remanded civil rights action of daughter so father who acted *pro se* could obtain legal counsel)). *See also Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123 (2d Cir. 1998) (court held that parent who was not attorney could not appear *pro se* on behalf of child and remanded the case to determine whether child was entitled to attorney under *in forma pauperis* statute).

Finally, Petitioners claim that school districts will be able to appeal unfavorable hearing level decisions to court and obtain default judgments against children unrepresented by counsel. This argument is without merit because such a maneuver is prohibited by Federal Rule of Civil Procedure 55(b)(2), which states: "no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. . . ." The scenario presented by Petitioners of school districts running to court to appeal due process decisions while children are helplessly bound by the judgment cannot occur.

The policy considerations in favor of prohibiting *pro se* representation therefore overwhelmingly outweigh the concerns raised by Petitioners.

CONCLUSION

For the above reasons, *Amici* urge that this Court hold that a non-lawyer parent of a minor child with a disability may not proceed *pro se* in a federal court action under the IDEA.

Respectfully submitted,

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